The case of *Che Ah and Che Yang Kelsom* v. *Che Ahmad, supra,* can, in my view, be easily distinguished on the facts, in that there the court had not given its permission to the administrators to sell the lands when the higher purchase offer was made, and the Court of Appeal, holding that it was the duty of the court to protect the rights of the parties who had an interest in the land, preferred the higher price. In this case, leave to sell the lands to the intervener had been given to the respondents by the order. This was followed very soon afterwards by the intervener's exercising his sub-option. Whether in exercising his sub-option the intervener should have given his notice to Simon Barnabas rather than to the respondents' solicitors was never raised in argument and is, in my view, in any case unimportant. What is important is that both the respondents and the intervener, in reliance of the terms of the order, subsequently reached agreement regarding the purchase of the lands and in accordance with the terms of the option granted by the respondents to Simon Barnabas, the intervener had paid to the respondents by way of deposit and part payment ten per cent of the purchase price. I am of the view that in the circumstances of this case, a binding contract was created between the intervener and the respondents, as soon as the intervener exercised his option to purchase.

The argument of counsel for the applicant, that the intervener by not coming to this court sooner to assert his rights under the contract has forfeited his right to purchase the lands, is not tenable: it is clear the interlocutory injunction which the applicant had obtained restrained the respondents from disposing of the lands to the intervener.

For the above reasons the applicant also fails on his second ground.

For the above reasons, I dismissed the application with costs to the respondents. By way of consequential order, I also dissolved the interlocutory injunction with costs to the respondents with a direction that any damages suffered by the estate arising out of the granting of the injunction be assessed by the Senior Assistant Registrar and be paid to the estate by the applicant.

As previously observed, the presence of existing tenants on the lands at the date of the making of the order was a factual issue easily ascertainable by the applicant from either the respondents themselves or the valuers. Both the respondents and the valuers positively denied that there was any tenant on the lands. As for the sale price of the lands, the respondents had fixed the purchase price specified in their application for the order on the strength of the valuer's report. The applicant has not said that this was an unreasonable valuation but merely contended that the value of the lands had since increased. That the price of the lands was reasonable was subsequently confirmed by another firm of valuers, C.H. Williams Talhar & Wong Sdn. Bhd., who assessed the value of the lands at 84 cents p.s.f. as at November 3, 1977 and at 90 cents p.s.f. as at November 3, 1978. In the light of this I considered the applicant's conduct in pursuing this application to be unreasonable. The applicant had held up completion of the sale and had caused the beneficiaries to the estate to wait unnecessarily for their share of the proceeds of sale. In my view the costs awarded to the respondents should be paid personally by the applicant, and I so ordered.

On the view I had taken of the application, the question as to the manner in which the order should be amended became irrelevant.

Order accordingly.

Solicitors: *Thillaimuthu & Phock Kin; Sharma & Co.; Ng Ek Teong & Partners.*

S.M. APPADURAY & ANOR. v. R. ANANDA & ANOR.

[O.C.J. (George J.) June 8, 1981]
[Kuantan — Civil Suit No. 203 of 1980]

Practice & Procedure — Order 14 application — Boundary dispute — Expert evidence required — Triable issues — Application for summary judgment disallowed.

Evidence — Expert evidence — Boundary dispute.

The plaintiffs were the registered proprietors of a lot of land which has a common boundary with that of the lot of land belonging to the defendants. The dispute between the said parties concerned what and where in fact was the common boundary. The first defendant contended that the brick wall between the houses on each of the lots was the common boundary while the plaintiffs contended that the wall had encroached onto the plaintiffs' lot to the extent of 513 sq. ft. of the plaintiffs land and that that occupation was unlawful. The plaintiffs relied, *inter alia,* on the affidavit of a surveyor regarding the said encroachment. The defendants questioned the correctness of the survey made by the plaintiffs' surveyor.

The plaintiffs applied for judgment under Order 14 of the Rules of the High Court 1980.

Held, dismissing the plaintiffs' application: (1) the challenge to the accuracy of the survey created a triable issue as to the positioning of the boundaries of the two lots;

(2) the court was not in a position to form an opinion of the boundaries without the surveyor explaining why the court should adopt his findings.

CIVIL SUIT.

Lim Kean Chye (*Peter Lai* with him) for the plaintiffs.

C.V. Dass for the defendants.

Cur. Adv. Vult.

George J.: When this application under Order 14 of the Rules of High Court came up for hearing I had not only the affidavits filed on behalf of the parties but also the pleadings of both the parties before me.

The plaintiffs are the registered proprietors of a lot of land in the town of Kuantan (Lot No. 9280) which lot has a common boundary with that of the lot of land (Lot No. 9281) the registered proprietors of which are the defendants.

The quarrel between the parties is as to what and where in fact is the common boundary. The 1st named defendant (who had taken over the interest of the 2nd named defendant) contends that the brick wall between the houses on each of the lots is the common boundary while the plaintiffs contend that that wall has encroached onto the plaintiffs' lot to the extent that the 1st named defendant is in occupation of some 513

square feet of the land belonging to the plaintiffs and that that occupation is unlawful.

The plaintiffs rely, *inter alia,* on the affidavit of a registered and licensed surveyor Kamaruddin bin Mat Yunus who as a result of a survey done by him was of the view that the wall had encroached onto lot No. 9280 to the extent of 513 square feet. The plaintiffs' contention is that in the face of the surveyor's finding there is nothing more to be said.

Encik Lim Kean Chye's arguments in support of the application has to have been based on the premise that Kamaruddin's survey was correctly and accurately done.

Encik C.V. Dass for the defence however raised questions suggesting that on the face of the survey plan exhibited to Kamaruddin's affidavit the correctness of the survey and its accuracy are questionable. It would seem that certain of the original boundary stones were missing and were replaced by new ones, perhaps by Kamaruddin, raising the not unreasonable and *bona fide* question whether the replacements were correctly placed and consequently whether the survey by Kamaruddin is accurate. Apart from that it may not be irrelevant for me to point out as I did in my judgment in Raub High Court Criminal Trial No. 1 of 1979 that —

"... the opinions or beliefs of third persons are, as a general rule, irrelevant and therefore inadmissible. It is the function of the Judge and Jury to form their own conclusion or opinion on the facts stated.

There are, however, cases in which the court is not in a position to form a correct judgment without the help of persons who have acquired special skill or experience on a particular subject. In such cases the help of experts is required and the rule is relaxed and expert evidence is admissible to enable the court to come to a proper decision. The rule admitting expert evidence provided by section 45 of the Evidence Act is founded on necessity.

It is the duty of the judge to decide whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered an expert.

....

At page 656 of that authoritative book, *Archbold* Criminal Pleading, Evidence and Practice 38th Edition is paragraph 1356a which reads, 'the duty of experts is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. *Davie* v. *Edinburgh Magistrate* (1953) S.C. 34 at 40.'

The principle of course is that the responsibility for the determination of every question that arises in a case rests upon the court including a question upon which expert evidence is called."

In my view the challenge to the accuracy of the survey creates a triable issue as to the positioning of the boundaries of the two lots. And in any event I am not in a position to form an opinion of the boundaries without the surveyor explaining to me to my satisfaction as to why I should adopt his findings.

The defence also contends that even if there has been an encroachment onto lot 9280 in all the circumstances in equity the plaintiffs are estopped from complaining about it. Encik Lim Kean Chye's argument in respect of that contention is that the principles of equity have no bearing in a boundary dispute in a Torren's system of land registration. Sections 340(2) and 341 of the National Land Code were referred to me.

I do not think that the answer to that issue is as clear cut as that and in my view poses an interesting and perhaps difficult question of law that needs to be resolved which cannot properly be done without the court first appraising itself of the full facts (some of which are in dispute) that lead to the parties being in the unhappy situation that they find themselves in, which cannot be done on affidavit evidence.

In the circumstances the order of the court was that the application be dismissed with costs.

Application dismissed.

Solicitors: *Peter Lai & Co.; Shook Lin & Bok.*

GOVERNMENT OF MALAYSIA v. PRESTON CORPORATION (M) SDN. BHD.

[O.C.J. (Wan Hamzah J.) June 9, 1981]
[Kuala Lumpur — Civil Suit No. 850 of 1978]

Revenue Law — Income Tax — Penalty — Application for summary judgment — Whether taxpayer can raise defences and apply for leave to defend — When penalty treated as tax payable — Limitation — Limitation Ordinance, s. 6(4) — Income Tax Act, 1967, ss. 99, 102, 103, 106, 113 & 125.

In this case the plaintiff sued the defendant for a total sum of $105,911.85 made up of (a) 93,983.50 penalty and $9,328.35 increased penalty imposed in respect of the year of assessment 1971; (b) $3,000 penalty and $300 increased penalty in respect of the year of assessment 1974. The plaintiff applied for liberty to enter judgment and the defendant asked for unconditional leave to defend. The defendant contended (a) that the Director General could impose a penalty only if the conditions specified in section 113 of the Income Tax Act, 1967, existed and these conditions did not exist in this case; (b) the action was time barred under section 6(4) of the Limitation Ordinance.

Held: (1) by virtue of section 125(2) of the Income Tax Act, 1967, sections 103 to 106 of the Act are made applicable to penalties, in that penalties under section 113(2) of the Act are to be treated as tax payable:

(2) the defendant's contention that the penalty was incorrectly assessed could not therefore be entertained as section 106 of the Act precluded such a plea being entertained;

(3) Section 106(3) of the Income Tax Act, 1967, clearly provides that the court shall not entertain any plea that the amount sought to be recovered is incorrectly increased under section 103(4) of the Act;

(4) section 125(2) of the Income Tax Act being a specific provision introduced after the enactment of section 6(4) of the Limitation Ordinance, prevails over the general provision in section 6(4) of the Ordinance, so far as penalty under section 113(2) of the Income Tax Act is concerned;

(5) a contention that the assessment of tax was made out of time in contravention of section 91(1) of the Income Tax Act is a plea that the tax was incorrectly assessed and therefore could not be entertained under section 106(3) of the Act.

Case referred to:-

(1) *Government of Malaysia* v. *Ng Song Choon* [1975] 1 M.L.J. 131.

CIVIL SUIT.

Jaafar bin Mat Saman for the plaintiff.

R.R. Sethu for the defendant.

Wan Hamzah J.: The plaintiff sues the defendant for a total sum of $105,911.85. By this summons the